SANITARY LEGISLATION.

COURT DECISIONS.

KANSAS SUPREME COURT.

Nuisances—An Ordinance Prohibiting Tin Cans, Manure, Garbage, or Rubbish in a City Held to be Unreasonable and Void.

CITY OF GOODLAND *v.* POPEJOY. (May 6, 1916.)

An ordinance which prohibits the placing of tin cans, manure, ashes, or rubbish in a street or alley or permitting such articles or substances to remain on a lot is unreasonable and void, because the ordinance is unnecessarily burdensome and it makes no distinction between conditions which are harmful and those which would not affect health or comfort.

The defendant was charged with maintaining a cattle yard and pigpen within the city of Goodland, Kans., in violation of a city ordinance which reads as follows:

SECTION 1. That it shall be unlawful for any person or persons to deposit, put, throw, or place in any street or alley in the city of Goodland, Kans., any tin cans, manure, garbage, slop, swill, ashes, refuse, filth, offal, unwholesome substance, vegetable or animal matter, or any rubbish whatever.

SEC. 2. That it shall be unlawful for any person or persons to deposit, put, throw, place, or allow to aremin on any lot or lots owned or occupied by such person, or persons, at any place in said city, any tin cans, manure, ashes, garbage, slops, swill, refuse, filth, offal, unwholesome substance, vegetable matter, or animal matter, or any rubbish whatever.

[157 Pacific Reporter, 410.]

BURCH, J.:

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The contention is the ordinance is void. Presumably the ordinance was enacted under the authority given cities of the second class to secure the general health and to prevent and remove nuisances. (Gen. Stat., 1909, sec. 1405, as amended by chapter 116, Laws 1911.) The ordinance is not directed against depositing tin cans, manure, ashes, garbage, and refuse on private property under conditions which render them offensive to others or detrimental to the public health, and is not directed against allowing the enumerated articles and substances to remain on private property under conditions which make them offensive or harmful. No distinction is made between nocuous and innocuous, reasonable and unreasonable. The offense is complete if any of the things mentioned be deposited or allowed to remain, whatever the quantity, circumstances, or length of time. Ashes from the furnace or stove can not be deposited or kept even in a safe receptacle, and refuse from the kitchen can not be deposited or kept even in a garbage can until the garbage collector can be called. Manure can not be removed beyond the city limits as soon as dropped, and consequently a horse or cow can not be kept at all, even although the barn or lot be kept clean and free from accumulations of offensive matter.

Cities of the first class are given express power to suppress hogpens. (Cen. Stat., 1909, sec. 918.) Such power is withheld from cities of the second class. Without statutory authority cities may suppress hogpens only when they are located and kept in such a way as to cause annoyance. (2 Dillon, Municipal Corporations, 5th Ed., sec. 693.) A stable for the family horse is not a nuisance per se, and whether or not a livery stable is a nuisance depends on where it is located and how it is kept and used. (2 Dillon, Municipal Corporations, 5th Ed., sec. 692.) A cowpen for the family cow is not a nuisance per se. Open cattle yards where cattle are kept for feeding or fattening in such numbers that nuisances necessarily result may be suppressed by proper ordinance. (2 Dillon, Municipal Corporations, 5th Ed., sec. 690,

note p. 1046.) But the ordinance in question recognizes no conditions with which it is possible to comply under which domestic animals may be kept on private property anywhere within the city limits. Having undertaken without qualification to make things nuisances which are not so in fact and which become nuisances only under conditions which are not recognized, section 2 of the ordinance is void.

The city marshal, who made the complaint, seems to have felt that the ordinance did not go quite far enough, and so added to the charge allegations that the defendant's premises were foul, offensive, and injurious; that they produced disagreeable and unhealthy smells; that they annoyed persons residing in the neighborhood; and that they constituted a nuisance. The allegations were superfluous to any charge preferred under the ordinance, and because of the invalidity of the ordinance the complaint did not state an offense.

The judgment of the district court is reversed, and the cause is remanded, with direction to discharge the defendant.

Mason, Porter, West, and Dawson, JJ., concurring, Johnston, C. J., and Marshall, J., dissent.

ILLINOIS SUPREME COURT.

State Board of Health—Employment of Attorney—Appropriation for this Purpose Held to be Void.

FERGUS *v.* RUSSEL, STATE TREASURER. (Nov. 6, 1915.)

The validity of an appropriation act passed by the Legislature of Illinois June 29, 1915 (Laws of 1915, p. 203), was attacked in the courts by taxpayers. One of the items provided $2,500 per annum for the services of an attorney for the State board of health. The laws of Illinois, aside from this appropriation act, did not authorize the State board of health to employ an attorney, but on the contrary required that all prosecutions and proceedings instituted by the State board of health should be prosecuted by the State's attorney in each county.

The court held that the appropriation was invalid for the reason that the State board of health was without authority to employ an attorney.

The case is reported in 110 Northeastern Reporter, page 130.

WISCONSIN SUPREME COURT.

Diphtheria—Diagnosis—Disease not Recognized until After Death—Judgment for Damages Reversed.

HRUBES *v.* FABER et al. (Apr. 11, 1916.)

The plaintiff sued to recover damages for the death of his daughter, a child 7 years of age, which was alleged to have been caused by unskillful and improper treatment by the defendant, who was a physician.

The child was ill only five days. She did not complain of sore throat at any time, although the defendant in making an examination found a slight swelling in her throat. The clinical symptoms did not, in the opinion of the physicians who saw the child, indicate diphtheria nor any serious condition; but after her death it was admitted that the cause of death was diphtheria.

The jury awarded damages, apparently upon the theory that the physician was negligent in not having a bacteriological examination made to assist in the diagnosis and in not administering diphtheria antitoxin.

The supreme court, however, reversed the judgment, and decided that the evidence was not sufficient to establish negligence or lack of skill on the part of the attending physician.

The opinion is printed in full in 157 Northwestern Reporter, page 519.